

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 943 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No.

2. To be referred to the Reporter or not? No.

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

JOHNY MEHTA

Versus

SUSHILADEVI S AGRAWAL

Appearance:

MR. B.B. NAIK, for for appellant.

NOTICE UNSERVED for Respondent No. 1

MR SP DAVE, A.P.P. for the respondent no. 2.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 31/03/98

ORAL JUDGEMENT

Being aggrieved with the judgment and order dated dated 28-2-1985 in Criminal Case No. 753 of 1982, the appellant has preferred this appeal with the leave from this Court.

2. The facts of the case might be gathered from the judgment of the learned Chief Metropolitan Magistrate, Ahmedabad :

The complainant Mr. Johny Mehta, Assistant Director of Inspector (Intelligence) in the office of the Commissioner of Income-Tax, Ashram Road, Ahmedabad, at the relevant point of time, in the company of the other officers searched the residential premises of the accused (respondent herein) on 26-6-1981. The accused was examined on oath on the same day u/s 131 (1) (A) of the Income Tax Act, 1961 (the Act for short). During her examination she was asked about the locker and the accused is alleged to have stated that she did not know anything about it. During the search of the premises Bank locker key was found and was seized. It pertained to the bank locker no. 89 in General Cooperative Bank Ltd., Memnagar Branch. It stood jointly in the name of the accused and her husband Shivbhagwan. On search having been carried out some jewellery was found and seized on 4-8-1981. It was found that this locker was operated on several occasions by the accused during 6-7-1979 to 24-2-1981. The accused was again examined by the complainant on oath on 9-7-1981 by virtue of the aforesaid provisions. During examination the accused is alleged to have admitted having the aforesaid locker referred to and its operation by her. The statement of the husband of the accused was also recorded by the complainant on 30-6-1981. He admitted having the locker jointly with his wife. It was the case of the complainant that the accused was legally bound to furnish the information regarding the locker and to tell truth on oath. She, however, first denied knowledge about the locker and then intentionally gave false evidence in the judicial proceedings under the Act. The accused is, therefore, alleged to have committed the offences punishable u/s 177, 179, 181, 182 and 193 of the Indian Penal Code (IPC for short).

3. The matter proceeded before the learned Chief Metropolitan Magistrate before whom the prosecution examined one witness Niranjan Naranbhai, from General Cooperative Bank Ltd., Memnagar Branch. It appeared from the evidence of the complainant that the search was carried out under the authorisation appearing at exh. 3. This warrant of authorisation came to be issued u/s 132 of the Act. In this warrant of authorisation several names appeared over and above the names of the complainant. However, in the clause of authorisation no name has been entered. The authorisation bears the

signature of C.N. Vaishnav who was the then Director of Income-Tax (Inspection). The purpose of visit was explained to the accused who put her signature on exh. 3. Two panchas were brought for the purpose of carrying out search. The complainant also stated that he administered oath to the accused for the purpose of recording her statement. The statement was placed at exh. 4 in the record of the proceedings. The questions appear to have been asked in Hindi. In the background of these facts, it was further observed by the learned Chief Metropolitan Magistrate that on 30-6-1981 the husband of the accused went to the office of the Income-Tax Department and disclosed that there was locker in General Cooperative Bank Ltd., at Navrangpura Branch. This locker was shown to some of the officers of the Department by the husband of the accused. On 30-6-1981 Shri Agrawal stated that the locker stood in the name of Mr. and Mrs. Agrawal. Such statement of the accused recorded on oath by the complainant was placed at exh. 6. On 9-7-1981 the accused was again examined on oath. On that occasion she is alleged to have stated that the locker stood in her name and that of her husband, in the aforesaid bank. She is alleged to have stated that she had operated the locker five months before the date on which the statement was recorded. The first statement was placed on record of the proceeding before the learned Chief Metropolitan Magistrate at exh. 7. The complainant admitted in the cross-examination that the accused requested him to record the statement in "Hindi" since she did not know English. He denied that no oath was administered to the accused. He however, did not recollect the words used by him in administering the oath. He also admitted that the accused appeared to be worried and the doctor was present. During the course of search Dr. Joshi was called to treat her. The complainant also admitted in the cross-examination that no locker exclusively in the name of the accused was found.

4. In the back ground of the aforesaid facts, the material and respective submissions the learned Chief Metropolitan Magistrate has observed that two statements recorded at exh. 4 and 7 were certainly contradictory regarding the locker in question. The learned Chief Metropolitan Magistrate has also examined the matter from the stand point of further statements of the accused. According to him she was not well and had high blood pressure. She stated that she had then become unconscious. About the locker in question she stated that she knew nothing about it because she did not know what the locker was. She denied the contents of the

statements exh. 4 and 7. According to her, nothing was explained to her. The learned Chief Metropolitan Magistrate has observed that it was likely that in absence of her husband she was taken by surprise, and, appeared to have made evasive replies.

5. The learned Magistrate then proceeded to consider the question about the ambit of Section 131 (1) (A) of the Act. It was contended on behalf of the accused that the said provision was required to be construed strictly. It was also contended that unless it was clearly proved in the evidence that the officer had "reason to suspect that any income was concealed or was likely to be concealed by any person or class of persons within his jurisdiction," he was not competent to exercise powers conferred under sub-section (1) of the Act on the authorities referred to in that sub-section, and he did not belong to that category at the relevant point of time. The learned Magistrate has then proceeded to consider the provisions in question. The relevant discussion on the question proceeds from the reproduction of the provisions and the same might be reproduced from the judgment of the learned Magistrate.

"(1) The Income-tax Officer, Appellate Assistant Commissioner, (Inspecting Assistant Commissioner, Commissioner (Appeals) and Commissioner) shall, for the purpose of this Act, have the same powers as are vested in Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely :

- (a) discovery and inspection.
- (b) enforcing the attendance of any person, including any officer of banking company and examining him on oath;
- (c) compelling the production of books of account and other documents; and
- (d) issuing commissions.

Section 131 (1) (A) reads as follows :

"If the Assistant Director of Inspection has reason to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purpose of making an

inquiry or investigation relating thereto it shall be competent for him to exercise the powers conferred under sub-section (1) on the Income-tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other Income-tax authority

Now, it can be seen from the warrant of authorisation, exh. 3, that it was issued by the Director of Inspection. The warrant reads as follows"

"Whereas information has been laid before me and on the consideration thereof, I have reason to believe that :

A summons under sub-section (1) of Section 37 of the Income-tax Act, 1922 or under sub-section (1) of Section 131 of the Income-tax Act, 1961 or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922 or under sub-section (1) of sec. 142 of the Income-tax Act, issued by

A. The Inspection Asstt.
Commissioner of Income-tax/Income-tax officer. to.....) Name of person)
on (date)..... to
produce, or cause to be produced books
of account or

B. Other documents specified in the relevant summons or notice and he has omitted failed to produce , or cause to be produced, such books of accounts or other documents as required by such summons or notice;

A summons under sub-section (1) of section 37 of the Income-tax Act, 1922 or under sub-section

(1) of section 131 of the Income-tax Act, 1961, or a notice under sub-section (1) of section 142 of the Income-tax Act, 1961 has been issued by the Inspecting Assistant Commissioner or Income-tax/Income-tax Officer..... to (Name of person) on(date) ... to

produce or cause to be produced, books of account or other documents specified in the relevant summons or notice and he will not produce or cause produced such books of account or other documents as required by such summons or notice;

If a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 or under sub-section (1) of the Section 131 of the Income-tax Act, 1961, or a notice under sub-section (4) of the section 22 of the Indian Income-tax Act, 1922 or under sub-section (1) section 142 of the Income-tax Act, 1961 is issued to Shiv Bhagwan Aggrawal (Name of the person) to produce , or clause to be produce, books of account or other documents which will be useful, or relevant proceedings under the Indian Income-tax Act, 1922 or under the Income-tax Act, 1961, he would not produce, or cause to be produce, such books of account or other documents as required by such summons or notice;"

Thereafter, on page 2, premises are mentioned and then is a clause which states that the Director of Inspection has reason to suspect that such books of accounts etc. are likely to be found in the premises. As stated earlier, even though the names of as many as eight Officers appear in the warrant, no name is entered in the space opposite the words "this is to authorise and require you....." It is submitted that the officers named in the sub-section (1) of Section 131 are the Income-tax Officers, Appellate Assistant Commissioner, Inspecting Assistant Commissioner and Commissioner (Appeals), and they are the only officers who have the same powers as are vested in the court in the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely"-

(a) Discovery and inspection;

(b) enforcing the attendance of any

person, including any officer of
a banking company and examining
him on oath'

(c) compelling the production of
books of account and other
documents, and

(d) issuing commissions.

In the case of these officers, it is not necessary to make out a ground as stated in sub-section (1) (A) in which the words "has reason to suspect" are used. It is obvious in this case that the Director of Inspection was not the Officer carrying out the search. The warrant does not state in terms that he had reason to suspect that books of accounts, other documents, etc. were likely to be found in the premises of the accused. It is however urged that the complainant has not put any material before the court by which the Court can come to the conclusion that the officer i.e. the complainant had reason to suspect that any income was concealed or was likely to be concealed by the accused. The warrant in terms is not the warrant which specified this fundamental requirement before the officer could exercise powers vested under that section. It is submitted that on account of this fundamental defect, the complainant had no authority to exercise powers conferred under sub-section (1) on the officers named therein. Now, this is a very important point in law and I accept that there is a considerable force in the argument raised on behalf of the accused. It is submitted on behalf of prosecution that the complainant was fully competent to exercise powers under section 132 which deals with search and seizure and which also authorises an officer to examine any person in charge of conduct of the proceedings. On behalf of the accused, it is contended that when the complaint specifically relies on a particular provision, prosecution cannot avail of any other provision which may be similar though not exactly similar in ambit and scope. Paragraph 3 of the complaint clearly mentions that the accused was examined on oath under Section 131 (1) (A) of the Income-tax Act. Therefore, it is rightly contended that the prosecution cannot avail of the provisions of section 132 of the Income-tax

Act. If the complainant had no powers as mentioned under section 131 (1), proceedings suffer from fundamental infirmity which must operate to the detriment on the prosecution and to the benefit of the accused. Warrant is also defective because it does not specifically authorise the complainant to record statement on oath."

6. The learned Magistrate has then proceeded to consider the provisions of Sections 177, 179, 181, 182 and 193 of the IPC and the decisions which have been cited by the learned advocates.

7. Considering the evidence on record adduced before the learned Magistrate and considering the provisions which were referred to, the learned Magistrate came to the conclusion that the proceeding undertaken by the complainant suffers from defect which went at the root of the matter and even if it was established that the accused prevaricated deliberately, she could be convicted of the offence with which she was charged. Thus, on account of fundamental defect in the nature of the proceeding that was undertaken, the accused was found not guilty for the offence with which she was charged.

8. Having heard the learned Additional Standing Counsel for the appellant, I am of the opinion that there is no reason to differ from the reasons given by the learned Metropolitan Magistrate. It is no doubt true that respondent could not be served by the appellant as the matter came up for hearing before this Court pursuant to the notice issued at the instance of the appellant by this Court. However, since the facts of the case warrant no interference with the impugned judgment and order of acquittal, there is no reason to undertake repeat exercise of serving the respondent for the purpose of hearing her (accused) or her advocate. This is the appeal of 1985 and it would be in the interest of justice if the same is dismissed for the reasons recorded by the learned Magistrate. Following order is, therefore, passed :-

This acquittal appeal is dismissed.